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No. 82-97

In the Supreme Court of the United States

OCTOBER TERM, 1981

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,

Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Copyright Royalty Tribunal may lawfully establish a compulsory copyright license fee for coin-operated phonorecord players that is essentially a monopoly price, when Congress explicitly denied full monopoly protection for this copyright use under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*?

2. Whether the Copyright Royalty Tribunal may ignore the collective financial condition and costs of copyright owners in establishing a compulsory copyright license fee, which, under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, must afford a "fair return" to copyright owners?

3. Whether the Copyright Royalty Tribunal may lawfully provide for automatic interim adjustments to an existing compulsory copyright license fee, when the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, provides that the Tribunal may adjust fees only once every ten years?

THE PARTIES

Petitioner Amusement and Music Operators Association is a national, nonprofit trade association of operators, manufacturers, and distributors of coin-operated phonorecord players, commonly known as jukeboxes, and other coin-operated amusement devices. Petitioner is incorporated in the State of Delaware and has no parent or affiliated corporation. Respondent Copyright Royalty Tribunal is a federal administrative agency established by the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.* The other parties who participated in the proceedings below are: The American Society of Authors, Composers, and Publishers; Broadcast Music, Inc.; and SESAC, Inc.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
The Parties	i
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	2
Statement of the Case	2
Introduction	2
The Parties	3
Statutory Background	4
Tribunal Proceedings	4
Seventh Circuit Review Proceedings	7
Reasons For Granting The Writ	10
I. The Tribunal's Establishment Of What Is Essentially A Monopoly Price For A Copyright Use With Respect To Which Congress Explicitly Denied Monopoly Protection Is Inconsistent Both With The Act And With General Legal Principles	10
II. The Tribunal Violated The Act And General Legal Principles By Refusing To Consider The Financial Condition Of Copyright Owners, And The Costs Incurred By Them, In Ascertaining What Would Constitute A Fair Return Under The Act	16

PAGE

III. The Tribunal Violated The Act And General Principles Of Administrative Law By Establishing Automatic Interim Rate Adjustments For The Periods Between Ratemaking Proceedings 20

IV. This Case Raises Important Issues Which Should Be Decided By This Court 23

Conclusion 25

Appendix:

A—Opinion of the United States Court of Appeals for the Seventh Circuit 1a

B—Final Rule of the Copyright Royalty Tribunal 33a

C—The Tribunal's Explanation of the Rule 35a

D—Relevant Provisions of the Copyright Revision Act of 1976 ..... 64a

TABLE OF AUTHORITIES

Cases

	PAGE
American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981)	13
Baker v. Selden, 101 U.S. 99 (1880)	14
Celanese Chemical Co. v. United States, 632 F.2d 568 (5th Cir. 1980), *cert. dismissed*, 453 U.S. 950 (1981)	20
Consolidated Rail Corporation v. United States, 619 F.2d 988 (3d Cir. 1980)	20
Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975)	15
Graham v. John Deere Co. of Kansas City, 383 U.S. 1 (1966)	14
Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248 (1851)	14
Interstate Commerce Commission v. New York, New Haven and Hartford Railroad, 372 U.S. 744 (1963)	19
Norbay Music, Inc. v. King Records, Inc., 290 F.2d 617 (2d Cir. 1961)	15
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	18, 19
Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1 (1981)	18
Tenneco Oil Co. v. Federal Energy Regulatory Commission, 571 F.2d 834 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978)	19
Todamerica Musica, Ltda. v. Radio Corporation of America, 171 F.2d 369 (2d Cir. 1948)	15
White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908)	14
Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963)	19

Statutes and Rules

PAGE

Copyright Act of 1909,
17 U.S.C. § 1(e) (1976) (repealed) 2, 12

Copyright Revision Act of 1976,
17 U.S.C. § 101 *et. seq.* ..... i, 1, 4, 10
17 U.S.C. § 106 ..... 8, 10, 11
17 U.S.C. §§ 107-110 11
17 U.S.C. § 111 11
17 U.S.C. § 115 11
17 U.S.C. § 116 ..... 4, 11
17 U.S.C. § 116(b)(1) 2, 4
17 U.S.C. § 116(c) 4
17 U.S.C. § 118 11
17 U.S.C. § 118(b)(2) 14
17 U.S.C. § 118(b)(3) 14
17 U.S.C. § 801(a) 2
17 U.S.C. § 801(b) 5, 16
17 U.S.C. § 801(b)(1) 2, 3, 20, 22
17 U.S.C. § 801(b)(1)(A) 15
17 U.S.C. § 801(b)(1)(B) 5, 16
17 U.S.C. § 801(b)(1)(C) 16
17 U.S.C. § 801(b)(1)(A)-(D) 4, 12
17 U.S.C. § 801(b)(1)(D) 16
17 U.S.C. § 801(b)(2)(A) 22
17 U.S.C. § 804(a) 2, 4, 20
17 U.S.C. § 804(a)(2) 4
17 U.S.C. § 804(a)(2)(C) 3

28 U.S.C. § 1254(1) 2

37 C.F.R. § 306 (1981) 1, 2

45 Fed. Reg. 62 (1980) 4

PAGE

46 Fed. Reg. (1981):
884 1
896 22
10476 19
10481 19
10485 19

Other Authorities

N. Boorstyn, *Copyright Law* (1981) 12

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) 21

R. Posner, *Economic Analysis of Law* (2d ed. 1977)..15, 17

Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 Bull. of Copyright Soc. 215 (1977) 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Amusement and Music Operators Association petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-32a) is reported at 676 F.2d 1144. The final rule of the Copyright Royalty Tribunal (App. B, *infra*, 33a-34a) is published at 37 C.F.R. § 306 (1981). The Tribunal's explanation of the rule (App. C, *infra*, 35a-63a) is published at 46 Fed. Reg. 884 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.*, are set forth in Appendix D hereto. The Tribunal's final rule, which is published at 37 C.F.R. § 306 (1981), is set forth in Appendix B hereto.

STATEMENT OF THE CASE

Introduction

On January 5, 1981, the Copyright Royalty Tribunal published a final rule adjusting the compulsory copyright license fee for coin-operated phonorecord players, which are commonly called "jukeboxes" (App. B, *infra*, 33a-34a). Prior to 1976, when Congress enacted the Copyright Revision Act, 17 U.S.C. § 101 *et seq.*, the copyright laws generally had exempted jukebox owners from paying copyright royalties for public performances of copyrighted works on jukeboxes. *See* 17 U.S.C. § 1(e) (1976) (repealed). In 1976, however, Congress determined that jukebox owners should pay a compulsory copyright license fee of $8.00 per jukebox per year, beginning in 1978. 17 U.S.C. § 116(b)(1). Congress also directed the Copyright Royalty Tribunal, which was established under the 1976 Act (17 U.S.C. § 801(a)), to begin rulemaking proceedings in January 1980 to determine whether any adjustment to the $8.00 statutory fee was required under the criteria set forth in 17 U.S.C. § 801(b)(1). The Tribunal is authorized to undertake similar rulemaking proceedings in 1990 and at ten-year intervals thereafter. 17 U.S.C. § 804(a).

At the completion of its 1980 rulemaking proceedings, the Tribunal concluded that the statutory fee should be increased to $50.00 per jukebox per year. The Tribunal found that the new fee should be phased-in, starting at $25.00 for 1982 and 1983, and then rising to $50.00 for the years 1984 through 1986 (App. B, *infra*, 33a). The Tribunal also concluded that the $50.00 fee should be adjusted in 1987 to reflect pre-1987 changes in the Consumer Price Index (App. B, *infra*, 34a). The Tribunal thus increased the fee set by Congress by at least 525%, and perhaps more, depending upon future increases in the Consumer Price Index.

On April 16, 1982, the United States Court of Appeals for the Seventh Circuit denied review of the Tribunal's rule (App. A, *infra*, 32a). Thus, the Tribunal's construction of these provisions cannot be challenged again for at least ten years, when new adjustment proceedings may be held. 17 U.S.C. § 804(a)(2)(C).

The Parties

Petitioner Amusement and Music Operators Association ("AMOA") is a national trade association of over 2100 operators, manufacturers, and distributors of jukeboxes and other coin-operated amusement devices. Respondent Copyright Royalty Tribunal is a federal administrative agency which Congress established in 1976 "to make determinations concerning [among other things] the adjustment of reasonable copyright royalty rates." 17 U.S.C. § 801(b)(1). The American Society of Authors, Composers, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. are three music "performing rights societies"—private associations of composers and artists—who participated in the rulemaking proceedings at issue here.

Statutory Background

The Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, permits authors and composers to copyright most songs and melodies ("nondramatic musical works"), but does not invariably grant such persons an absolute right either to preclude use of their property or to exact monopoly compensation for such use. Under the Act's "compulsory licensing" scheme, such copyright owners are required to license their works to jukebox operators at a price set by statute. 17 U.S.C. § 116. In particular, the Act requires that each jukebox operator file an application for a compulsory license with the Register of Copyrights and "deposit . . . a royalty fee for the current calendar year of $8.00 for [each] phonorecord player." 17 U.S.C. § 116(b)(1). After these fees are collected by the Copyright Office, they are to be distributed in due course to copyright owners, primarily through performing rights societies. 17 U.S.C. § 116(c).

The Act also provides for the periodic review and adjustment of the compulsory license royalty fee by the Tribunal, in accordance with several specified criteria. *See* 17 U.S.C. § 801(b)(1)(A)-(D). Thus, the Tribunal was required in 1980 to commence rulemaking proceedings to determine whether continued compliance with the statutory criteria required any adjustment in the compulsory copyright license fee for jukeboxes. 17 U.S.C. § 804(a). The Act further provides that subsequent adjustment proceedings may be held, upon petition by any person having a "significant interest" in the outcome, "in 1990 and in each subsequent tenth calendar year" thereafter. 17 U.S.C. § 804(a)(2).

Tribunal Proceedings

Pursuant to its statutory mandate, the Tribunal published a notice of rulemaking in the Federal Register on January 2, 1980 (45 Fed. Reg. 62), and thereafter con-

ducted a seven-day hearing concerning the jukebox royalty fee. *See* App. C, *infra*, 36a. AMOA, ASCAP, BMI, and SESAC participated in the hearing. App. C, *infra*, 36a. AMOA presented evidence to show that continued compliance with the statutory criteria required no adjustment of the $8.00 fee. App. C, *infra*, 42a-44a.[1] AMOA emphasized (*see* App. C, *infra*, 48a) that the Tribunal was statutorily required to ascertain whether, among other things, the license fee "afford[ed] the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions." *See* 17 U.S.C. § 801(b)(1)(B). AMOA therefore produced evidence to show the precarious financial condition of the jukebox industry, and argued that the Tribunal must also examine the costs and economic conditions of the copyright owners. In particular, AMOA contended that the Tribunal must pierce the veil of the performing rights societies, and consider the collective costs and financial condition of the ultimate copyright owners themselves. *See* App. C, *infra*, 48a.

The Tribunal rejected AMOA's view and instead found "the ASCAP/SESAC *concept* of basing the rate on marketplace analogies to be most attractive." App. C, *infra*, 52a (emphasis in original). ASCAP and SESAC had argued that Section 801(b) of the Act, 17 U.S.C. § 801(b), required the establishment of "a compulsory license fee similar to the fee which would be reached on the open

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[1] AMOA also contended, as the Seventh Circuit noted, that "the burden of proof to justify any increase above the $8.00 fee set by Congress rested on the copyright owners" (App. A, *infra*, 5a). The court of appeals, however, approved the Tribunal's holding "that *none* of the parties had the burden of proof in the initial mandatory hearing" (App. A, *infra*, 6a; emphasis in original).

marketplace if performing rights societies and jukebox operators were free to negotiate for licenses absent a compulsory license." App. C, *infra*, 37a. ASCAP and SESAC suggested that three "marketplace analogies" were sufficient to make this determination (App. C, *infra*, 37a): "(a) general establishments, such as bars, grills, restaurants and taverns using mechanical music (i.e., music provided by non-live means); (b) background music services; and (c) foreign jukebox operators." Relying only on these three "marketplace analogies," ASCAP and SESAC argued that the royalty fee should be increased from $8.00 to $70.00. App. C, *infra*, 36a.

The Tribunal found these "marketplace analogies" sufficient to provide "an appropriate benchmark" for the jukebox royalty fee. App. C, *infra*, 53a. The Tribunal noted, however, "that some jukebox operators function on a narrow profit margin, and that certain jukeboxes produce modest revenues." App. C, *infra*, 53a. Thus, the Tribunal concluded (App. C, *infra*, 57a):

> On the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria, the Tribunal has adjusted the royalty rate for coin-operated phonorecord players to $50 per machine. The rate takes into account both of what is paid for music elsewhere under similar circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators.

Finally, the Tribunal rejected AMOA's contention that the Act provides no authority for making interim fee adjustments. App. C, *infra*, 46a-48a. Thus, the Tribunal set the fee at $25.00 per jukebox per year for 1982 and 1983, at $50.00 for the years 1984 through 1986, and at

$50.00, subject to an inflation adjustment, for the years 1987 through 1990. App. C, *infra*, 53a-54a.

Seventh Circuit Review Proceedings

AMOA and ASCAP each filed petitions for review in the United States Court of Appeals for the Seventh Circuit.[2] Both petitions were denied. *See* App. A, *infra*, 32a.

AMOA challenged the Tribunal's rule on several grounds, including the three grounds upon which it seeks review here.[3] First, AMOA argued that the Tribunal erred in relying upon the three so-called "marketplace analogies" as the price benchmark for jukebox royalty fees because "the allegedly 'analogous' fees in each situation were established under the protection of government-granted monopoly rights . . . rather than in a free competitive

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[2] ASCAP argued that the Tribunal's $50.00 fee was outside the "zone of reasonableness" and that the lowest reasonable fee was $70.00. *See* App. A, *infra*, 25a. ASCAP also asserted that the Tribunal erred in phasing in the new fee, claiming that the $50.00 fee, if reasonable, should have been established immediately. *See* App. A, *infra*, 22a. BMI appeared as a party-respondent, supporting the final rule against AMOA's objections, but taking no position as to ASCAP's contentions. SESAC did not appear as a party in the court of appeals.

[3] AMOA also challenged the Tribunal's findings on the grounds that: (1) the so-called "marketplace analogies" were not sufficiently comparable to jukebox copyright use (C.A. Br. at 40); (2) the Tribunal ignored extensive evidence concerning the financial plight of the jukebox industry (*id.* at 44); and (3) the Tribunal's decision improperly relied upon information contained in a letter that was not part of the administrative record (*id.* at 65). AMOA also argued that the increase was not supported by "substantial evidence," and that the performing rights societies had not carried the burden of justifying it. *Id.* at 36, 43.

market." App. A, *infra*, 26a; *see* AMOA C.A. Br. at 40.[4] Second, AMOA asserted that the Tribunal erred in refusing, for the purpose of calculating a "fair return" to copyright owners, to accept any evidence concerning the collective costs or financial condition of copyright owners. C.A. Br. at 52. Third, AMOA contended that the Tribunal's decision to adopt an interim inflation adjustment violated the Act. *Id.* at 56.

The Seventh Circuit rejected each of these contentions. First, the court held (App. A, *infra*, 27a; emphasis added) that the "*arguably* analogous musical fees provided substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark." Second, the court held (App. A, *infra*, 30a) that the Tribunal properly declined to consider any evidence concerning the costs and financial conditions of copyright owners because "it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material,"

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[4] The Act provides full monopoly protection to composers and performers with respect to both: (a) "mechanically" recorded music played in establishments such as restaurants, and (b) "background" music supplied by wire, radio, or other means to business and commercial subscribers. 17 U.S.C. § 106. With respect to these uses, copyright owners have absolute discretion in licensing their works and may exact monopoly prices. The license fees paid by jukebox operators in foreign countries are also set in a monopoly context. As the Tribunal noted (App. C, *infra*, 40a): "[T]he [foreign] fees are either negotiated with industry groups or are subject to governmental approval."

and also because "the inquiries sought by AMOA into the internal distribution processes of the performing rights societies are irrelevant to the purposes of the Act." Third, the court held (App. A, *infra*, 22a) that the interim inflation adjustment "merely demonstrate[s] a flexibility with which Congress intended to endow the Tribunal in making its determinations." Thus, the court of appeals found "no fault with the Tribunal's final rule as promulgated" (App. A, *infra*, 32a).

REASONS FOR GRANTING THE WRIT

The Tribunal's final rule, which has increased by at least 525% the fee that Congress thought appropriate for imposition just four years ago, is inconsistent not only with the plain language and legislative history of the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, but also with numerous decisions of this and other courts. Moreover, the decision of the court below, which upheld the rule in all respects, constitutes the definitive interpretation of various provisions of the Act, which cannot be challenged anew at least until 1990, when the Tribunal may again undertake rulemaking in this area. Nonetheless, the construction of the Act and general legal principles endorsed by the court below doubtless will be cited as authority in future rulemaking proceedings under other provisions of this and other statutes.

I. The Tribunal's Establishment Of What Is Essentially A Monopoly Price For A Copyright Use With Respect To Which Congress Explicitly Denied Monopoly Protection Is Inconsistent Both With The Act And With General Legal Principles.

The Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, establishes three levels of copyright protection. First, and as a general rule, the Act provides complete monopoly protection, pursuant to which copyright owners may either preclude use of their property or exact whatever charge they can obtain for its use. 17 U.S.C. § 106. Second, when copyrighted material is used pursuant to the "fair use" provisions of the Act, copyright owners must submit to the use of their property without receiving

any compensation at all. *See* 17 U.S.C. §§ 107-110. Third, under the "compulsory licensing" provisions of the Act, which are applicable to jukeboxes, copyright owners must allow others to use their works in exchange for compensation that is specifically set by statute. *See, e.g.*, 17 U.S.C. § 116. The Tribunal's final jukebox royalty rule is utterly inconsistent with this congressional scheme.

In raising the jukebox compulsory copyright license fee by at least 525%, the Tribunal relied solely upon the three so-called "marketplace analogies" suggested by the performing rights societies. *See* page 6, *supra*. In fact, however, the "marketplace analogies" that the Tribunal found conclusive are all instances of monopoly pricing. For example, the Act specifically grants absolute monopoly protection to composers and performers of "background music," who therefore may exact monopoly compensation for the use of their property. *See generally* 17 U.S.C. § 106.[5] Jukeboxes, by contrast, are one of a handful of copyright uses for which Congress specifically denied full monopoly protection and instead chose to establish a compulsory licensing scheme, which takes into account not only the needs of copyright owners, but also those of copyright users and the general public. 17 U.S.C. § 116.[6]

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[5] As previously noted (*see* page 8 n.4, *supra*), the other two analogies used by the Tribunal—"mechanical" recordings played in restaurants and jukebox license fees paid in foreign countries—are also examples of monopoly pricing.

[6] Compulsory licensing is applicable to jukeboxes and three additional copyright uses: (a) secondary transmissions by cable television systems (17 U.S.C. § 111); (b) mechanical reproduction of musical records and tapes that have been distributed to the public (17 U.S.C. § 115); and (c) use of copyrighted materials by noncommercial educational broadcasters (17 U.S.C. § 118). Congress obviously intended compulsory licensing as an intermediate level between uncompensated "fair use" and full monopoly protection.

Until 1976, when Congress established the compulsory licensing scheme for jukeboxes, jukebox owners had generally been exempt from any special requirements under the copyright laws. *See* 17 U.S.C. § 1(e) (1976) (repealed). In 1976, therefore, Congress clearly intended to improve the position of copyright owners by allowing them, for the first time, to receive some return for the use of their works by jukebox operators, but not the monopoly profits that they would receive from full copyright protection.[7] Indeed, Congress specifically directed the Tribunal to set a reasonable rate by, among other things, accommodating both the interests of copyright owners (who naturally want a monopoly price) and those of copyright users (who naturally prefer a lower price). *See* 17 U.S.C. § 801(b)(1)(A)-(D).

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[7] Commentators have repeatedly emphasized that compulsory licensing is a direct limitation on monopoly control and pricing. *See, e.g.*, Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 Bull. of Copyright Soc. 215, 261 (1977) ("Having first come to a decision that there are appropriate copyright interests . . . to be reallocated, Congress has two ways of dealing with an exception from the scheme: (1) either by altogether exempting certain uses from payment or permission, thereby concluding that no further reliance on the copyright scheme incentives is either needed or warranted; or (2) by substituting statutory for author controls of access and price (compulsory licensing), reaffirming the essential reliance on the copyright-scheme monetary incentives."); N. Boorstyn, *Copyright Law* § 5:12 at 146 (1981) ("'[C]ompulsory licensing' . . . was established to encourage the widespread mechanical, or recorded, use of music and to prevent absolute control of popular music by the copyright owners thereof.").

In this rulemaking, however, the Tribunal established the jukebox fee simply by ascertaining the monopoly price that would be charged absent compulsory licensing (which it mistakenly believed to represent a "marketplace" price). The Tribunal then slightly discounted that price to take into account the financial condition of the jukebox industry, but provided no methodological support for the final fee that it selected.[8] By setting the jukebox licensing rate at what is essentially a monopoly price, the Tribunal effectively established a monopoly price with respect to a copyright use for which Congress explicitly denied monopoly protection. Thus, the Tribunal has produced an inefficient level of copyright use—which Congress specifically sought to avoid—and has defeated the very purpose of the Tribunal's existence. *See* page 15 & n.10, *infra*. Moreover, by creating a result through administrative regulation that Congress explicitly rejected when it established

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[8] The Tribunal lowered the jukebox fee from the $70.00 benchmark proposed by ASCAP and SESAC to $50.00, not because the Tribunal desired to account for the fact that $70.00 was a monopoly price, but rather because the Tribunal believed that the "analogies" were not *completely* comparable to jukebox copyright use, and also because it was concerned about possible harm to the jukebox industry. *See* App. C, *infra*, 52a-53a; *see also* page 6, *supra*. In other words, the Tribunal was concerned not that $70.00 was a monopoly price, but that $70.00 was not necessarily the monopoly price which the marketplace would set for jukeboxes in the absence of compulsory licensing. Inasmuch as the Tribunal issued no contemporaneous methodological explanation for the fee that it set, any new explanation would now constitute mere *"post hoc* rationalizations of the agency [which] . . . cannot serve as a sufficient predicate for agency action." *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 539 (1981).

the copyright regulatory scheme, the Tribunal unlawfully exceeded the powers that Congress delegated to it.[9]

The Tribunal's complete reliance on monopoly price analogies, which the Seventh Circuit unreservedly approved, is inconsistent not only with the clear intent of the Act, but also with numerous decisions in which this Court has held that government grants of monopoly protection, particularly in the area of intellectual property, must be construed narrowly. *See, e.g., Hotchkiss* v. *Greenwood*, 52 U.S. (11 How.) 248, 267 (1851) (patent protection limited to those inventions which, in addition to being new and useful, required "more ingenuity and skill . . . than were possessed by an ordinary mechanic acquainted with the business"); *Baker* v. *Selden*, 101 U.S. 99 (1880) (copyright protection held not to extend to ideas); *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) (piano rolls, "mechanical" reproductions of copyrighted musical compositions, held not to be "copies" within meaning of prior Act); *Graham* v. *John Deere Co. of Kansas City*, 383 U.S. 1, 19 (1966) (emphasizing the importance of non-obviousness for patent protection: "He who seeks to build a better mousetrap today has a long path to tread before reaching the Patent Office.").

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[9] Had Congress simply intended for jukebox owners to pay monopoly royalties, it would have enacted provisions for jukeboxes similar to those applicable to copyright use by noncommercial broadcasters, who are encouraged to negotiate license agreements with copyright owners (*see* 17 U.S.C. § 118(b)(2)). The Tribunal establishes mandatory fees for copyright use by noncommercial broadcasters only in cases where licenses have not been negotiated privately. In such cases, the Act provides (17 U.S.C. § 118(b)(3)) that "the Copyright Royalty Tribunal may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in [17 U.S.C. § 118(b)(2)]."

Moreover, the decision below conflicts with numerous decisions in which other courts of appeals have recognized that the central purpose of compulsory licensing is to prevent the deleterious effects on pricing and consumption which monopoly control typically engenders.[10] *See, e.g., Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975) ("Congressional intent [in establishing compulsory licensing of mechanical reproduction] was apparently twofold: to encourage future creative endeavor and to combat monopolization in the music industry"); *Norbay Music, Inc.* v. *King Records, Inc.*, 290 F.2d 617, 618 (2d Cir. 1961) (with regard to mechanical reproduction, "the distrust of monopoly was so great that the form of remedy chosen was that of the famous compulsory license"); *Todamerica Musica, Ltda.*, v. *Radio Corporation of America*, 171 F.2d 369, 371 (2d Cir. 1948) ("[T]he right of a copyright owner to protect reproduction rights was at first denied by the Supreme Court and then only granted by Congress with important restrictions as to the extent of this monopoly . . . by the addition of a provision for compulsory licenses and a maximum royalty").

The Tribunal's decision to set a compulsory license fee at an essentially monopoly price therefore violates the Act and is inconsistent with numerous decisions of this and other courts.

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[10] Indeed, Congress has specifically directed the Tribunal to set the jukebox compulsory license fee at a rate which, among other things, will "maximize the availability of creative works to the public." 17 U.S.C. § 801(b)(1)(A). The strong public policy against monopolies rests, of course, not on the mere fact that monopolies lead to higher prices, but on the fact that higher prices artificially restrict consumption of goods by the public. *See* R. Posner, *Economic Analysis of Law* 201 (2d ed. 1977).

II. The Tribunal Violated The Act And General Legal Principles By Refusing To Consider The Financial Condition Of Copyright Owners, And The Costs Incurred By Them, In Ascertaining What Would Constitute A Fair Return Under The Act.

The Act specifically provides that the Tribunal must set jukebox royalty fees at a level that will, among other things, "afford the copyright owner a fair return for his creative work." 17 U.S.C. § 801(b)(1)(B). The Act also requires that the fee reflect "the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to . . . capital investment, costs, [and] risk". 17 U.S.C. § 801(b)(1)(C).[11] As AMOA repeatedly asserted, in both the Tribunal and the court of appeals (App. C, *infra*, 48a; App. A, *infra*, 29a-30a), these determinations logically require the making of some inquiry into the costs incurred by copyright owners in connection with the production or purchase of copyrighted material. In setting the fees at issue here, however, the Tribunal eschewed consideration of any cost data whatsoever,[12] choosing instead to rely only

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[11] The Act also requires that the fee be calculated "[t]o maximize the availability of creative works to the public" (17 U.S.C. § 801(b)(1)(A)), "[t]o afford the . . . copyright user a fair income under existing economic conditions" (*id.* at § 801(b)(1)(B)), and "[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices" (*id.* at § 801(b)(1)(D)).

[12] The Tribunal repeatedly declined (*see* App. A, *infra*, 8a, 29a; AMOA C.A. Br. at 53-54) to allow AMOA to present evidence concerning the costs incurred by copyright owners or their overall economic condition, preferring instead to consider only the so-called "marketplace analogies." Indeed, the Tribunal was so convinced

(footnote continued)

upon "marketplace parallels" which, as we have shown (*see* pages 10-14, *supra*), are simply instances of monopoly pricing. The court of appeals approved the Tribunal's departure from its clear statutory mandate, recognizing that "the Tribunal relied on . . . general marketplace analogies not related to cost." App. A, *infra*, 8a.

By definition, a monopoly price far exceeds cost. *See* R. Posner, *Economic Analysis of Law* 282 (2d ed. 1977) ("[J]ust as the natural monopolist may, if unregulated, charge a price well above his average costs, so too may the copyright monopolist"). By looking solely to monopoly price analogies, the Tribunal failed even to consider, let alone estimate, what amount would constitute a "fair return" to the copyright owners. Instead, the Tribunal incorrectly assumed that "analogous" monopoly prices (set in the context of full copyright protection) are conclusive

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that these "analogous" monopoly prices afforded a sufficient measure of "fair return" that it refused to consider any information concerning the distribution practices of the performing rights societies that actually receive the royalties. The court of appeals approved the Tribunal's approach (App. A, *infra*, 29a): "In the proceedings before the Tribunal, the AMOA vigorously sought to bring into issue the manner in which the performing rights organizations distributed jukebox royalties to their affiliates and members. . . . [W]e believe that the inquiries sought by AMOA . . . are irrelevant to the purposes of the Act and that the Tribunal acted properly in denying these requests."

Although Congress plainly contemplated that the performing rights societies would play a substantial role in the distribution of royalties, neither the Act nor its legislative history contains any hint that Congress intended to subsidize such enterprises at the expense of copyright users. The Act mandates that the copyright owners—not the performing rights societies—shall receive a "fair return." The Tribunal's failure to consider such evidence reduces its finding of "fair return" to a matter of pure conjecture.

as to what constitutes a "fair return" to copyright owners. The Tribunal simply disregarded its statutory mandate and the court of appeals approved that lawless act.[13]

Not only does the decision below disregard the requirements of the Act, but it also conflicts in principle with the decision of the District of Columbia Circuit in *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1 (1981). In *Recording Industry*, the court affirmed that portion of a Tribunal rule that established a new compulsory license fee for the mechanical reproduction of copyrighted works. Although the court of appeals there noted that the "setting of [such] royalty rate[s] is not a routine exercise in historical cost of service ratemaking," and that "a broader inquiry" is required to determine the "fairness" of the return to the copyright owner (662 F.2d at 8-9), the court emphasized that the Tribunal properly "analyzed the empirical evidence in

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[13] The court of appeals' reliance (App. A, *infra*, 8a, 30a) upon this Court's decision in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), for the proposition that a "fair return" may reasonably be established without any estimate of copyright owners' costs, is misplaced. Indeed, *Permian Basin*, a complicated natural-gas rate-setting case, supports the view that costs must be carefully considered in fixing a fair return. In *Permian Basin*, this Court merely allowed those costs to be estimated by using "composite cost data intended to evidence the national costs . . . of finding and producing gas-well gas" rather than insisting upon calculation of the actual costs of discovery and production of the gas in the geographical area that was the subject of the ratemaking proceeding. 390 U.S. at 800. Far from holding that costs may be ignored—and that mon[illegible]y-set "marketplace analogies" may be substituted as the sole proxy for "fair return"—*Permian Basin* holds that costs are critical to "fair return" ratemaking, but may be estimated when accurate data is clearly difficult or impossible to obtain.

relation to the statutory criteria" (*id.* at 10). Unlike the evidence here, the record evidence in *Recording Industry* included substantial empirical studies of the economic costs and well-being of copyright owners.[14]

Indeed, the Tribunal's refusal in this case even to approximate a rough surrogate for the costs incurred by copyright owners conflicts with numerous decisions that have repeatedly emphasized the importance of costs in "fair return" ratemaking. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968).[15] The Tribunal's de-

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[14] Among other things, the Tribunal noted two sets of statistics which indicated that copyright owners were not receiving a fair return on their costs. *See* 662 F.2d at 11 n.25. First, the Tribunal found that royalties paid to copyright owners had fallen drastically from slightly more than those paid to recording artists in 1955, to barely one-fourth of those paid to recording artists in 1979. 46 Fed. Reg. 10485 (1981). Second, although recording artists' royalties had increased to 16.8 percent of wholesale record prices in 1974, copyright owners' royalty payments had declined from 11.2 percent of wholesale record prices in 1964 to 7.27 percent in 1974. *Id.* at 10476, 10481.

[15] *See also Interstate Commerce Commission* v. *New York, New Haven and Hartford Railroad*, 372 U.S. 744, 747 n.5 (1963) (railroad rate setting: "Fully distributed costs based on the out-of-pocket costs plus a . . . distribution of the constant costs . . . indicate the revenue necessary to a fair return on the traffic, disregarding ability to pay."); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 298 n.6 (1963) (natural gas rate setting: "The phrase 'jurisdictional cost of service' as used here means the producer's system-wide cost of service (*i.e.*, all operating expenses . . . *plus* a fair return on the rate base) for its sales of natural gas subject to the Commission's jurisdiction."); *Tenneco Oil Co.* v. *Federal Energy Regulatory Commission*, 571 F.2d 834, 840 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (natural gas rate setting:

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termination, that the "fair return to copyright owners" requirement of the Act is necessarily satisfied by the award of de facto monopoly returns, without any inquiry into the collective costs or financial condition of copyright owners, is contrary both to the statute and to the case law.

III. The Tribunal Violated The Act And General Principles Of Administrative Law By Establishing Automatic Interim Rate Adjustments For The Periods Between Ratemaking Proceedings.

The Tribunal determined, without any statutory basis, that it was authorized to establish automatic—but not yet fully quantified—interim rate adjustments to become effective during the ten-year intervals between statutorily authorized ratemaking proceedings. *See* 17 U.S.C. § 804 (a).

Because the Act mandates not only that the Tribunal base fee adjustments upon explicit statutory criteria (17 U.S.C. § 801(b)(1)), but also that fees be re-examined only at ten-year intervals (17 U.S.C. § 804(a)), the Act plainly

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"The producers, under the Constitution as well as the Act, are, at bottom, only entitled to a fair return on their actual costs . . . ."); *Consolidated Rail Corporation* v. *United States*, 619 F.2d 988, 991 (3d Cir. 1980) (freight car rate setting; court holds that ICC used improper measure of cost when calculating "a fair return on the cost of owning and maintaining each type of freight car."); *Celanese Chemical Co.* v. *United States*, 632 F.2d 568, 571 n.4 (5th Cir. 1980), *cert. dismissed*, 453 U.S. 950 (1981) (coal transportation rate setting: "[T]he word 'costs' . . . include[s] all variable and constant costs plus a fair return on capital and an amount needed to attract additional capital.").

proscribes automatic interim fee adjustments such as those imposed here.[16] Similarly, it is beyond dispute that Congress intended that all fee increases be specially tailored to the unique conditions of the particular industries involved, not to general fluctuations in the broad-based Consumer Price Index. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 173 (1976) ("[I]t is therefore expected that any adjustment of a rate . . . shall be based on the economic conditions peculiar to the industries affected by that rate."). By definition, automatic fee adjustments are based not upon pre-adjustment review of specific industry conditions in light of specific statutory criteria, but upon mere, generalized predictions that the fee might not satisfy the statutory criteria in the future. The Act requires that adjustments be based upon findings, not predic-

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[16] The legislative history clearly shows that Congress envisioned *periodic*, rather than *continuous*, adjustments of compulsory license fees: "Chapter 8 establishes a Copyright Royalty Commission for the purpose of *periodically* reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory licenses . . . ." H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 173 (1976) (emphasis added). Congress made clear not only that it was not concerned that a fee might be stable over long periods of time, but that it actually intended that result where appropriate (*ibid.*): "The Committee does not intend these rate changes, whether up or down, should necessarily be made as the result of such periodic review." Moreover, congressional debate on the Act was focused not on the details of the periodic adjustment of compulsory license fees, but on the question whether there should be *any* periodic review of such fees and, if so, at what intervals. *See* AMOA C.A. Br. at 61-64 (description of legislative history).

tions, that an existing fee no longer satisfies the statutory criteria.[17]

Indeed, the Tribunal itself has recognized the impropriety of interim inflation adjustments in an analogous context. In the subsection immediately following that which establishes the criteria for adjusting jukebox royalty fees, the Act provides that one of the factors which the Tribunal may take into account in adjustment proceedings for cable television compulsory license fees—which may occur only every five years—is "national monetary inflation or deflation" (17 U.S.C. § 801(b)(2)(A)). Congress has made no such explicit provision for jukebox fees. *See* 17 U.S.C. § 801(b)(1).

Despite Congress,' specific expression of concern for the inflation-adjustment of cable television fees, however, the Tribunal recently rejected an industry proposal for interim inflation adjustment of such fees on the ground that the Act provides for review of these fees only once every five years. The Tribunal correctly stated that a "continuous adjustment mechanism would render this periodic review scheme meaningless" (46 Fed. Reg. 896 (1981)). Therefore, just as cable television rates (for which Congress explicitly expressed its inflation-adjustment concerns) cannot lawfully be subject to a "continuous adjustment mechanism" lest the Act's periodic review scheme be frustrated, *a fortiori* jukebox fees (for which Congress specifically expressed no such concern) cannot be subject to any interim inflation adjustment.

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[17] The Tribunal imposed two types of interim fee adjustments: (a) a phase-in mechanism, and (b) an inflation adjustment. The Tribunal ordered that its $50.00 rate be phased-in at $25.00 for 1982 and 1983, increased to the full $50.00 for 1984 through 1986, and then adjusted for inflation for 1987 through 1990. The procedure that the Tribunal followed here is, in this respect, simply inconsistent with its statutory mandate.

The Tribunal invoked a novel principle of administrative law to justify these interim jukebox fee adjustments: that the power of an administrative agency is not limited by its organic law, but extends to whatever Congress has not explicitly prohibited it from doing. Thus, the Tribunal stated (App. C, *infra*, 48a): "We find that there is nothing in the statute or legislative history which could be construed to limit the application of annual cost of living adjustments." The Seventh Circuit approved this concept of inherent agency authority (App. A, *infra*, 22a). Although the Tribunal and the court of appeals may have believed that the Act would be more effective if it provided for interim adjustments of jukebox royalty fees, the fact of the matter is that Congress made no such provision. By effectively rewriting the statute, the Tribunal has exceeded its statutory authority.

IV. This Case Raises Important Issues Which Should Be Decided By This Court.

As we have shown (*see* pages 10-22, *supra*), the court below declined review of the Tribunal's final jukebox rule despite the fact that the rule is inconsistent with both the Copyright Revision Act and general legal principles established by the decisions of this and other courts, and also with the way in which the Tribunal has construed the statute in analogous rulemaking proceedings. Not only has the Tribunal increased by at least 525% the statutory rate that Congress thought fair only four years ago, but, because of the peculiar structure of the Act, the Seventh Circuit's decision is now the law of the land and will remain so for at least ten years. Moreover, the rationale of the decision below will doubtless be relied upon in other Tribunal rulemaking proceedings.

Likewise, the ramifications of the Seventh Circuit's decision may extend well beyond the limits of the Copy-

right Revision Act. Because of the government's efforts at reducing unnecessary regulation, an increasing number of industries that were once fully regulated are now subject to only partial regulation. This case well demonstrates the effect of an administrative agency's reliance on statistics and indices generated by unregulated portions of an industry as a substitute for fulfilling its statutory mandate with respect to portions of the industry that Congress has chosen to regulate. Although such statistics may sometimes be relevant, they should never be deemed conclusive. *But cf.* Separate Findings of Facts, Conclusions and Opinion of Commissioner James, App. C, *infra*, 59a (emphasis in original) ("[I]t is clear that the marketplace guidelines of other analogous music users, provide the *only* credible evidence in the record to establish a 'reasonable' fee. Negotiated fees by analogous music users, which are identical or similar, based on this record is the only indicator of true market value."). The decision below ratifies the Tribunal's neglect of its statutory duty.

Also pregnant with pernicious implication is the reasoning that an administrative agency may do whatever Congress has not explicitly prohibited it from doing. That justification for administrative action is well wide of the mark because, by definition, administrative agencies possess only those powers that specifically have been delegated to them. They are bound to carry out—not create—basic government policy. Here, Congress was capable of granting copyright owners full monopoly protection instead of compulsory licensing rights, but chose not to do so. Likewise, Congress was capable of establishing an inflation accelerator for royalty fees, but again chose not to do so. The Tribunal exceeded not only the limits of its particular statutory mandate, but also the most fundamental principles of administrative law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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